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Oil and Gas, Natural Resources, and Energy Journal

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THE SIGNIFICANT NEXUS TEST: WHY THE WATERS OF THE UNITED STATES ARE SO MURKY

MICAH ADKISON*

Introduction

Be careful when you wade into murky water! In 1972, Congress granted authority to regulate the waters of the United States to the Environmental Protection Agency (EPA) under the Clean Water Act (CWA). Since then, the courts have labored to define *waters of the United States* resulting in a 4-1-4 plurality opinion in the principal case of *Rapanos v. United States*. The *Rapanos* Court identified two tests for defining waters of the United States, one articulated by the plurality, and one by Justice Kennedy—the significant nexus test. The significant nexus test, while broadly followed, has failed to limit EPA overreach.

EPA jurisdiction warrants a bright-line rule due to concerns about cooperative federalism, regulatory efficiency, resource allocation of the EPA, and stewardship of private lands. Violations of the CWA can result in substantial civil and criminal penalties. To avoid these consequences, small businesses, particularly private landowners and farmers, require certainty and regulatory clarity which cannot be obtained through nebulous terms of art like “significant nexus.”

The simplest solution is often the best solution. Justice Scalia offered such a simple solution in his plurality opinion in the principal case. His simple bright-line rule is based on the specific characteristics of the water

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(or wetland), such as its *physical connection* to traditionally covered waters and its *relative permanence*. This clarity maximizes resource allocation to protect the nation's natural resources, maintains fidelity to the nation's system of federalism, and reinforces confidence in private land use and development.

Congress delegated regulatory authority under the CWA to the EPA in order to control the pollution of the waters of the United States. Since passing the CWA, the meaning of the phrase "waters of the United States" has been expanded and contracted through agency interpretation and judicial review. Under the latest rule promulgated by the EPA (the "WOTUS Rule"), the EPA purported to extend its reach under the CWA by clarifying the phrase "waters of the United States." Now, the courts are again presented with the question of Congress's intent in passing the CWA. While the future of the WOTUS Rule remains uncertain, this article will analyze the debate surrounding the EPA's recent claim of jurisdiction and advocate for a clear bright-line rule upon adjudication of a case currently before the Sixth Circuit Court of Appeals.

I. Context and Summary of Litigation Before the Sixth Circuit

In 1972 Congress passed the CWA¹ to control the pollution of the nation's waters.² For over a century, the accepted meaning of the phrase "waters of the United States," as it pertained to federal legislation, was interstate waters that were actually navigable.³ The Supreme Court, in a more recent line of cases, has refined the meaning of this phrase to allow meaningful regulation by the EPA and Army Corps of Engineers ("Corps," "Corps of Engineers," or collectively with the EPA, the "Agencies"), under the CWA, while remaining mindful of the principles of federalism and private property rights.⁴

The WOTUS Rule was promulgated on June 29, 2015.⁵ In it the EPA claimed to "clarify" the definition of the phrase "waters of the United

1. 86 Stat. 884, as amended, 33 U.S.C. § 1251 *et seq.* (2015).

2. The "Clean Water Act" was originally billed as the Federal Water Pollution Control Act Amendments of 1972. See W. Henry Graddy, IV, *Let Us Hope for Smart Fish: A Clean Water Act Practitioner's Search for Ratchet Down*, 10 J. Nat. Resources & Envtl. L. 161, 162 (1995).

3. See *The Daniel Ball*, 10 Wall. 557 (1871).

4. See *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

5. Clean Water Rule: Definition of "Waters of the United States," 80 FR 37054-01.

States” under the CWA.⁶ The WOTUS Rule was scheduled to become effective on August 28, 2015.⁷ However, on August 27, 2015, in an action brought on behalf of thirteen states, a federal district judge in North Dakota granted an injunction against the EPA finding, in part, that because the WOTUS Rule purports to exert authority over bodies of water that bear no significant nexus to navigable waters, the rule likely “violates the congressional grant of authority to the EPA.”⁸

Threats by the federal government to impose the new rule on the thirty-seven states not party to the suit were met by strong opposition by many state attorneys general.⁹ On September 4, 2015, the federal judge in North Dakota declared that his ruling only applied to the parties to the original action in North Dakota.¹⁰ Finally, on October 9, 2015, in an action brought on behalf of Ohio, Michigan, Tennessee, Oklahoma, Texas, Louisiana, Mississippi, Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, Kentucky, the North Carolina Department of Environmental and Natural Resources, South Carolina, Utah, and Wisconsin (all thirty-one states challenging the WOTUS Rule are collectively referred to as the “Opposing States”), the Sixth Circuit granted a nationwide stay of enforcement of the rule pending a judicial determination on the merits.¹¹

II. Background of Federal Water Pollution Regulation

A. Traditional Meaning of Waters of the United States

One-hundred and one years before passing the CWA, the United States Supreme Court defined navigable waters as those waters “which are navigable in fact.”¹² The Court elaborated that rivers are “navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”¹³

6. *Id.*

7. *Id.*

8. North Dakota v. U.S. EPA, No. 3:15-CV-59, 2015 WL 5060744, at *5 (D.N.D. Aug. 27, 2015).

9. See, e.g., Press Release, Scott Pruitt, AG Pruitt Comments on North Dakota Federal Judge’s Ruling Blocking Implementation of WOTUS Rule (Aug. 28, 2015) (on file with author).

10. Order Limiting the Scope of Preliminary Injunction to the Plaintiffs, Civil No. 3:15-cv-59 (Sep. 4, 2015).

11. In re EPA, 803 F.3d 804, 809 (6th Cir. 2015).

12. The Daniel Ball, 10 Wall. 557, 563 (1871).

13. *Id.*

[Waters] constitute navigable waters of the United States within the meaning of the acts of Congress . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.¹⁴

The Mississippi River is an example of an interstate navigable water—a traditional water of the United States. This interpretation of federal regulatory jurisdiction remained relatively unchanged until the passage of the Federal Water Pollution Control Act Amendments of 1972.

B. Federal Water Pollution Control Act Amendments of 1972

In 1972, Congress amended the Federal Water Pollution Control Act, which after further amendments in 1977 became the Clean Water Act.¹⁵ The CWA “restructured federal authority over water pollution control, consolidating most regulatory authority over discharges to the nation’s waters with the [EPA], but left the Corps with jurisdiction over dredge and fill activity.”¹⁶

The CWA provides, “[e]xcept as in compliance with [various sections of the CWA], the discharge of any pollutant by any person shall be unlawful.”¹⁷ The CWA further provides for two permitting systems, the National Pollutant Discharge Elimination System (NPDES),¹⁸ and Permits for Dredged or Fill Material.¹⁹ Negligent violations of permit conditions or limitations incur criminal penalties, for the first offense, of “not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both.”²⁰

The Administrator of the EPA (“Administrator”) may grant a NPDES permit for “point source”²¹ discharges of pollution, or it may waive the

14. *Id.*

15. See Thomas L. Casey III, *Testing Rapanos: United States v. Robinson and the Future of “Navigable Waters”*, 10 Engage: J. Federalist Soc’y Prac. Groups 39 (2009) (providing an outstanding summary of the CWA).

16. *Id.*

17. 33 U.S.C. § 1311(a).

18. 33 U.S.C. § 1342.

19. 33 U.S.C. § 1344.

20. 33 U.S.C. § 1319(c)(1).

21. A point source is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged, [and specifically excludes] agricultural

permitting requirement upon Administrator approval of a state administered permitting system.²² The Secretary of the Army, acting through the Chief of the Corps of Engineers, may issue or deny permits for the discharge of “dredged or fill material” into navigable waters.²³

The CWA defines “navigable waters” as “waters of the United States, including the territorial seas.”²⁴ In other words, everything that falls within the EPA’s interpretation of the phrase “waters of the United States” is by definition a navigable water insofar as it is covered by the CWA.

The Court has been left to determine Congress’s intent in using the phrase “waters of the United States” when it delegated the authority to enforce CWA to the EPA.²⁵ By 1975, the phrase had been expanded beyond the historical concept of “navigability,”²⁶ and came to include “‘freshwater wetlands’ adjacent to other covered waters.”²⁷ What followed was a line of cases meant to shape the jurisdictional reach of the EPA and Corps of Engineers over waters, waterways, and wetlands lying within the borders of the United States.

C. Agency Rulemaking and Judicial Deference

Analysis of agency propriety in promulgating new rules must begin with a baseline understanding of the Administrative Procedures Act (APA). The

stormwater discharges and return flows from irrigated agriculture. 33 U.S.C. § 1362; *See also* Decker v. Northwest Environmental Defense Center, 133 S. Ct. 1326, 1332 (2013) (interpreting Congress’ mandate to the EPA to require NPDES permitting for “stormwater discharges [into navigable waters] associated with industrial activity”).

22. 33 U.S.C. § 1342(d)(e).

23. 33 U.S.C. § 1344.

24. 33 U.S.C. § 1362(7). Note the relevance of the defined term. Would a jurisdictional bright-line be better drawn by defining *waters of the United States* as meaning *navigable waters*, including the territorial seas? This legislative ambiguity lies at the heart of the debate over the EPA’s jurisdictional reach. *See* United States v. Riverside Bayview Homes, 474 U.S. 121, 133 (1985) (“Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.”)

25. *See* United States v. Riverside Bayview Homes, 474 U.S. 121 (1985); Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 715 (2006).

26. *See* Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975) (“[A]s used in the [Clean] Water Act, the term [“navigable waters”] is not limited to the traditional tests of navigability.”)

27. Casey, *supra* note 15, at 40 (citing 40 Fed. Reg. 31, 321 (1975)).

APA requires notice of proposed rulemaking in the Federal Register.²⁸ After publication of notice, “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”²⁹ This requirement is sometimes referred to as the “notice-and-comment requirement” of the APA. When modifications are made to the proposed rule, the agency only satisfies the notice of proposed rulemaking requirements if the modifications to the final adopted rule are a “logical outgrowth” of such notice.³⁰ “A [modification to a] final rule is a *logical outgrowth* if affected parties should have anticipated that the relevant modification was possible.”³¹

In reviewing an agency’s interpretation of a statute it administers, a court must determine whether “Congress has directly spoken to the precise question at issue” or whether “the statute is silent or ambiguous with respect to the specific issue.”³² If Congress’s intent is clear and unambiguous, such intent is given effect.³³ Conversely, if the statute is silent or ambiguous regarding the specific issue, the agency’s construction is entitled to deference if such construction is not “arbitrary, capricious, or manifestly contrary to the statute” (judicial deference under this analysis is “*Chevron* deference”).³⁴

III. The Shaping of the Supreme Court’s EPA Water Regulation Jurisprudence

A. United States v. Riverside Bayview Homes

*United States v. Riverside Bayview Homes*³⁵ centered on the Corps’ construction of the CWA to include “freshwater wetlands” within the meaning of “waters of the United States.” The Corps defined freshwater wetlands as:

those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of

28. 5 U.S.C. § 553(b).

29. 5 U.S.C. § 553(c).

30. *See Sprint Corp. v. FCC*, 315 F.3d 369, 375-76 (D.C. Cir. 2003); *Allina Health Services v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014).

31. *Allina Health Services*, 746 F.3d at 1107 (emphasis added).

32. *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

33. *Id.*

34. *Id.* at 843-44; *see also* 5 U.S.C. § 706.

35. 474 U.S. 121, 124 (1985).

vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.³⁶

Respondent, Riverside Bayview Homes, Inc. (“Riverside”), owned 80 acres of low-lying marshland near the shore of Lake St. Clair in Michigan.³⁷ In 1976, to prepare for the construction of a housing development on the property, Riverside placed fill materials on the property.³⁸ The Corps of Engineers sued in federal district court to enjoin Riverside from filling the property without the Corps’ permission because the property was an “adjacent wetland,” and thus within the Corps’ jurisdictional control.³⁹

The district court granted the injunction and held that the portion of Riverside’s property lying less than 575.5 feet above sea level was a wetland covered by the CWA.⁴⁰ On appeal, the case was remanded for consideration of the effect of later amendments to the CWA added in 1977.⁴¹ On remand, the district court again granted the injunction to the Corps because the property was a wetland within the Corps’ regulatory jurisdiction.⁴² Riverside again appealed and the Sixth Circuit Court of Appeals reversed because the semiaquatic characteristics of the Riverside property “were not the result of frequent flooding by the nearby navigable waters,” which likely fell outside Congress’s intended grant of regulatory authority to the Corps.⁴³

After granting certiorari, a unanimous Supreme Court reversed the Sixth Circuit.⁴⁴ The Court rejected the Sixth Circuit’s conclusion that “frequent flooding” by the adjacent navigable water is a “*sine qua non* of a wetland under the regulation.”⁴⁵ The Court noted the difficulty in determining the “point at which water ends and land begins.”⁴⁶ However, the district court’s findings were not clearly erroneous because Riverside’s property was “characterized by the presence of vegetation that requires saturated soil

36. *Id.* (citing 33 C.F.R. § 323.2(c) (1978)).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Riverside Bayview Homes*, 474 U.S. at 125.

41. *Id.* The relevant changes in the amendments of 1975 and 1977 were minimal, but the latter eliminated the use of the phrase “periodic inundation.” *Id.* at 124.

42. *Id.* at 125.

43. *Id.*

44. *Id.* at 126.

45. *Riverside Bayview Homes*, 474 U.S. at 129.

46. *Id.* at 132.

conditions for growth and reproduction[,] . . . the source of the saturated soil conditions on the property was ground water[, and . . . the] property was adjacent to a body of navigable water [in that the] saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to . . . a navigable waterway."⁴⁷

The Court noted that by defining "'navigable waters' as 'the waters of the United States' [Congress intended to make] it clear that the term 'navigable' as used in the [CWA] is of limited import."⁴⁸ The purpose of the Corps' permitting authority was a "legislative attempt to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁴⁹ Therefore, "Congress chose to define the waters covered by the [CWA] broadly."⁵⁰ "Because [Riverside's] property is part of a wetland that *actually abuts* on a navigable waterway," the Corps and the EPA's determination that such land is within its jurisdiction was reasonable.⁵¹

B. Solid Waste Agency of Northern Cook County v. Army Corps of Engineers

In 1986, the Corps attempted to exert jurisdiction over isolated waters, not necessarily adjacent to navigable waters, which "are or would be used as habitat by birds protected by Migratory Bird Treaties [or by] migratory birds which cross state lines" (the "Migratory Bird Rule").⁵² Fifteen years later, the Corps' expansive reach under the Migratory Bird Rule received the scrutiny of the United States Supreme Court.⁵³

Solid Waste Agency of Northern Cook County (SWANCC) was a consortium of Chicago suburban municipalities "united in an effort to locate and develop a disposal site for baled nonhazardous solid waste."⁵⁴ SWANCC located a site for its project comprising a sand and gravel mining site that was abandoned around 1960 and had "[given] way to a successful

47. *Id.* at 130-31 (internal quotation marks omitted).

48. *Id.* at 133.

49. *Id.* at 132 (quoting CWA § 101, 33 U.S.C. § 1251) (internal quotation marks omitted).

50. *Id.* at 133.

51. *Riverside Bayview Homes*, 474 U.S. at 134-35 (emphasis added).

52. 51 Fed.Reg. 41206-01 (1986). Of note, the regulation also purported to exert the Corps' jurisdiction over water "[u]sed to irrigate crops sold in interstate commerce." *Id.*

53. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

54. *Id.* at 162-63.

stage forest . . . [and] a scattering of permanent and seasonal ponds of varying size.”⁵⁵

The Corps initially concluded that it did not have jurisdiction over the site, but reversed its decision upon notification by the Illinois Nature Preserves Commission that migratory birds were observed at the site.⁵⁶ SWANCC proposed several plans to mitigate damage and preserve the site for the migratory birds and then received permits and approval from the Cook County Board of Appeals, the Illinois Environmental Protection Agency, and the Illinois Department of Conservation, but the Corps insistently refused to issue the Dredge or Fill permit under § 1344 of the CWA.⁵⁷

On appeal to the Seventh Circuit Court of Appeals from summary judgment in favor of the Corps, SWANCC argued that the Corps had exceeded its authority in claiming jurisdiction over “nonnavigable, isolated, intrastate waters based on the presence of migratory birds and in the alternative, that Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction.”⁵⁸ The court of appeals ruled for the Corps on both grounds.⁵⁹

Upon granting certiorari, the Supreme Court, in a 5-4 decision, reversed the Seventh Circuit’s ruling.⁶⁰ The Court noted that, in passing the CWA, “Congress chose to recognize, preserve, and protect the *primary* responsibilities and rights of States to [regulate] pollution . . . and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.”⁶¹ The Court interpreted the holding in *Riverside* to require a “*significant nexus* between the wetlands and ‘navigable waters.’”⁶² The Court distinguished *Riverside* from *SWANCC* by noting that the latter involves “wetlands that are not adjacent to bodies of open waters.”⁶³

55. *Id.* at 163.

56. *Id.* at 164.

57. *Id.* at 165.

58. *Id.* at 165-66.

59. *Solid Waste Agency*, 531 U.S. at 166.

60. *Id.* at 161.

61. *Id.* at 166-67 (emphasis added) (internal quotation marks omitted) (citing 33 U.S.C. § 1251(b)).

62. *Id.* at 167 (emphasis added). This was the genesis of what would later become an important phrase in the Court’s CWA jurisprudence.

63. *Id.*

The term “navigable waters” shaped the Court’s opinion as to “what Congress had in mind as its authority for enacting the CWA.”⁶⁴ The Court held that expansion of the Corps’ authority “over ponds and mudflats falling within the Migratory Bird Rule would result in a significant impingement of the States’ traditional and primary power over land and water use.”⁶⁵ Because such an expansive interpretation of the CWA would have “alter[ed] the federal-state framework by permitting federal encroachment upon traditional state power,” and it was not supported by “a clear indication that Congress intended that result,” the Court refused to defer to the Corps’ expansive interpretation of the CWA.⁶⁶

C. Rapanos v. United States

The Court’s CWA jurisprudence culminated in the 2006 decision *Rapanos v. United States*.⁶⁷ *Rapanos* resulted in a plurality, 4-1-4, opinion, which invalidated the Corps’ claim of jurisdiction, but established two important tests for determining the meaning of the phrase “waters of the United States.”⁶⁸

Rapanos was a consolidated case.⁶⁹ John Rapanos (“Rapanos”) backfilled a wetland on his property, more particularly described as “land with sometimes-saturated soil conditions . . . [lying] 11 to 20 miles [from the nearest body of navigable water].”⁷⁰ The Corps claimed that Rapanos’s saturated fields fell within the definition of “waters of the United States,” under the CWA.⁷¹ Because he backfilled his fields without a permit to do so from the Corps of Engineers, Rapanos was subjected to “[t]welve years of criminal and civil litigation.”⁷² The district court held that Corps had properly claimed jurisdiction because the wetlands were adjacent to “waters of the United States” and that petitioner was liable for violating the CWA.⁷³ On appeal, the Sixth Circuit Court of Appeals affirmed based on federal

64. *Id.* at 172.

65. *Solid Waste Agency*, 531 U.S. at 174 (internal quotation marks omitted).

66. *Id.* at 172-73.

67. 547 U.S. 715 (2006).

68. *Id.* at 716 (Syllabus by the Court).

69. *Id.* at 729. The actual case involved additional petitioners. For simplicity, this author outlines the facts and circumstances of only one of the petitioners, John Rapanos. This omission does not affect the subsequent legal analysis in any material way.

70. *Id.* at 719-20.

71. *Id.* at 720-21.

72. *Id.* at 721.

73. *Rapanos*, 547 U.S. at 715 (Syllabus by the Court).

jurisdiction over sites with “hydrologic connections to the nearby ditches or drains, or to remote navigable waters.”⁷⁴

In a plurality opinion, the Supreme Court rejected the Sixth Circuit’s “hydrologic connection” analysis, vacated the judgments below, and remanded for further proceedings.⁷⁵ Two rationales underlie the Court’s invalidation of the Corps’ assertion of jurisdiction, one articulated by the plurality, and the other given by Justice Kennedy in a separate concurrence.

1. “*Rapanos* Plurality Test”

Writing for the plurality, Justice Scalia emphasized that the burden of regulatory compliance with the Corps’ permitting requirements “is not trivial.”⁷⁶ The plurality complained about the pervasiveness of the Corps and the EPA’s broad assertions of jurisdiction over the “waters of the United States.”⁷⁷ Scalia also emphasized that “the CWA [only] authorizes federal jurisdiction . . . over ‘waters,’ [not over dry land].”⁷⁸

The plurality defined a *water of the United States* as “[(1)] a relatively permanent body of water [(2)] connected to traditional interstate navigable waters.”⁷⁹ The plurality further articulated the Corps’ jurisdiction over wetlands to cover those wetlands that have “a continuous surface connection with [a water of the United States], making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”⁸⁰

2. “*Significant Nexus* Test”

Writing only for himself, but joining in the holding, Justice Kennedy devised an alternate approach by expounding upon the phrase “significant nexus” mentioned by the *SWANCC* Court.⁸¹ Kennedy took issue with the plurality’s requirement that a body of water must be relatively permanent because, in his view, such a requirement would exclude “torrents [of water] thundering at irregular intervals through otherwise dry channels,” citing the

74. *Id.*

75. *Id.* at 757.

76. *Id.* (plurality opinion) (“The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915.”)

77. *See id.* at 722 (“In the last three decades, the Corps and the [EPA] have interpreted their jurisdiction . . . to cover 270-to-300 million acres of swampy lands . . . including half of Alaska and an area the size of California in the lower 48 States”).

78. *Id.* at 731.

79. *Rapanos*, 547 U.S. at 742 (emphasis added).

80. *Id.*

81. *See Solid Waste Agency*, 531 U.S. at 167.

Los Angeles River as an example of such a watercourse that might fall outside the Agencies' jurisdiction.⁸² The Agencies' claim of jurisdiction over such watercourses, according to Kennedy, would be entitled to *Chevron* deference.⁸³

Kennedy further contended that the plurality's requirement of a "continuous surface connection" was unsupported by the holding in *Riverside* in part because "the connection might well exist only during floods."⁸⁴ However, Kennedy noted, "mere hydrologic connection should not suffice in all cases, . . . [a]bsent some *measure of the significance* of the connection for downstream water quality [of traditionally navigable waters]."⁸⁵ Kennedy conceded that "the word 'navigable' in the [CWA] must be given some effect" by stating, "[w]hen . . . wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"⁸⁶

Kennedy's test for the Agencies' jurisdiction under the CWA requires a finding of a significant nexus between traditionally navigable waters and the wetland at issue. Kennedy would require that "the *wetlands*, either alone or in combination with similarly situated lands in the region, *significantly affect* the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"⁸⁷

IV. Analysis of the Current Challenge Before the Sixth Circuit

A. Overview of the WOTUS Rule

The WOTUS Rule categorically asserts EPA jurisdiction over interstate waters, territorial seas, impoundments of jurisdictional waters, covered tributaries, and covered adjacent waters.⁸⁸ The WOTUS Rule also makes numerous categorical exclusions.⁸⁹ Finally, the WOTUS Rule establishes

82. *Rapanos*, 547 U.S. at 769-70 (Kennedy, J., concurring).

83. *Id.* at 770.

84. *Id.* at 773-74.

85. *Id.* at 784 (emphasis added).

86. *Id.* at 779-80.

87. *Id.* at 780 (emphasis added).

88. 33 C.F.R § 328.3.

89. The Final WOTUS Rule purports to exclude:

- (1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- (2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding

that the significant nexus analysis will be applied on a case-specific basis over prairie potholes, Carolina and Delmarva bays, pocosins, Western Vernal pools in California, Texas coastal prairie wetlands, waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas (unless falling within a listed exclusion), waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional

Clean Water Act jurisdiction remains with EPA.

- (3) The following ditches:
 - i. Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
 - ii. Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
 - iii. Ditches that do not flow, either directly or through another water, into [waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; interstate waters, including interstate wetlands; or territorial seas].
- (4) The following features:
 - i. Artificially irrigated areas that would revert to dry land should application of water to that area cease;
 - ii. Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
 - iii. Artificial reflecting pools or swimming pools created in dry land;
 - iv. Small ornamental waters created in dry land;
 - v. Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
 - vi. Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
 - vii. Puddles.
- (5) Groundwater, including groundwater drained through subsurface drainage systems.
- (6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
- (7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

Id.

navigable water, interstate water, the territorial seas, impoundments, or covered tributary (unless falling within a listed exclusion), and *similarly situated* waters.⁹⁰

In promulgating the new WOTUS Rule, the Agencies primarily rely upon Justice Kennedy's formulation of the significant nexus test.⁹¹ The Agencies applied this "analytical framework" to a myriad of factual circumstances.⁹² The Agencies seek to define certain terms and phrases left undefined by Justice Kennedy's significant nexus test in *Rapanos*, such as: (a) "similarly situated" waters,⁹³ (b) "in the region," and (c) the functions to be determined in analyzing whether certain waters significantly affect the chemical, physical, or biological integrity of covered waters.⁹⁴

The Agencies defined the phrase "'similarly situated' in terms of whether particular waters are providing common, or similar, functions for downstream waters such that it is reasonable to consider their effect together."⁹⁵ The Agencies defined "region [as] the watershed that drains to the nearest [covered water]."⁹⁶

In the significant nexus analysis, the Agencies claim that in identifying the relevant functions—those functions that significantly affect the chemical, physical, or biological integrity of covered waters—the Agencies were "informed by the goals of the statute and the available science."⁹⁷ The rule states:

Functions to be considered for the purposes of determining significant nexus are sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of floodwaters; runoff storage;

90. *Id.*

91. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054-01, 37061 (2015).

92. *See id.* ("[T]here is no indication in [Justice Kennedy's] opinion that the analytical framework his opinion provides for determining significant nexus for adjacent wetlands is limited to adjacent wetlands.")

93. The rule appears to use "wetlands" and "waters" interchangeably.

94. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054-01, 37065 (2015).

95. *Id.* at 37066.

96. *Id.* at 37066-67. The United States Geological Society defines "watershed" as "the area of land where all of the water that falls in it and drains off of it goes to a common outlet." In other words, *all* land is within a watershed! U.S. Geological Society, What Is A Watershed?, <http://www.water.usgs.gov/edu/watershed.html> (last visited Oct. 5, 2015).

97. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054-01, 37067 (2015).

contribution of flow; export of organic matter; export of food resources; and provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, and use as a nursery area) for species located in traditional navigable waters, interstate waters, or territorial seas. The effect of an upstream water can be significant even when . . . providing . . . just one . . . of the functions listed.⁹⁸

B. Legal Challenges to the WOTUS Rule

When the Sixth Circuit reaches the merits of the EPA's jurisdictional claim, the court will be challenged to facilitate a solution that restores and maintains the chemical, physical, and biological integrity of the nation's waters,⁹⁹ while recognizing, preserving, and protecting the States' primary responsibility and rights to regulate pollution and use of land and water resources.¹⁰⁰

The Opposing States contend that the Agencies have failed to conform to the rulemaking requirements of the APA.¹⁰¹ Some particularly troubling aspects of the final WOTUS Rule are the distance limitations, e.g., "4,000 feet from the high tide or ordinary high water mark"¹⁰² of covered waters, which, according to the Opposing States, were not included in the proposed rule and thus, are not a "logical outgrowth of the rule proposed."¹⁰³ Because the distance limitations are not specifically supported by scientific findings, they are "not the product of reasoned decision-making [thereby making the

98. *Id.*

99. *Riverside Bayview Homes*, 474 U.S. at 133.

100. *Solid Waste Agency*, 531 U.S. at 166-67; *Rapanos*, 547 U.S. at 737; *see also* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999) (reinforcing the importance of federalism in agency rulemaking).

101. *In re EPA*, 803 F.3d 804, 806 (6th Cir. 2015); *see also* Karen Bennett and John Henson, *Redefining "Waters of the United States": Is EPA Undermining Cooperative Federalism?*, Engage Vol. 16, Issue 1 (The Federalist Soc'y), May 5, 2015 ("The comments of governors, attorneys general, and various state agencies and departments are nestled among over 1,055,000 mass mail comments, 11,800 generally non-substantive individual comments, 4,500 anonymous comments, and comments from a broad spectrum of businesses, industries, and environmental groups.")

102. In addition to the Opposing States' many criticisms of the WOTUS Rule, this particular aspect of the rule is especially onerous. For instance, when the 4,000-foot buffer is applied to the state of Oklahoma, the WOTUS Rule (and all of its legal trappings) covers 95% of the surface acres in the state. *See* American Farm Bureau Federation, *How WOTUS Will Affect Farmers: Completed Maps Showing WOTUS Jurisdiction* (2015), available at <http://www.fb.org/issues/wotus/resources/>.

103. *In re EPA*, 803 F.3d at 807.

WOTUS Rule] vulnerable to attack as impermissibly ‘arbitrary or capricious’ under the APA.”¹⁰⁴

It is not clear whether the significant nexus test is required or whether courts may apply the standard set forth by the *Rapanos* plurality. Following the *Rapanos* decision, the federal circuit courts split in their application of the results.¹⁰⁵ Although the Agencies have relied primarily, if not exclusively, upon Justice Kennedy’s significant nexus test, the *Rapanos* plurality test merits consideration, particularly because of the confusion created in determining the precise meaning of “significant nexus.” The plurality’s requirement that a covered water be a “relatively permanent body of water connected to traditional interstate navigable waters,” or a wetland with “a continuous surface connection with [a water of the United States], making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins”¹⁰⁶ has emerged as the more workable test.

The *Rapanos* plurality test reduces the Agencies’ temptation to impose arbitrary distance limitations on their claim of jurisdictional reach by eliminating the need to do so. The test imposes a relatively simple, case-by-case, wetland analysis to determine, scientifically, whether a wetland shares a “continuous surface connection” with a covered water. The most difficult aspect of such wetland analysis is likely determining the point at which it becomes “difficult to determine where the ‘water’ ends and the ‘wetland’ begins,” which seems to require subjectivity.

Admittedly, the *Rapanos* plurality test also requires certain exceptions to be included under the definition of “waters of the United States,” such as the Los Angeles River (a subject of Kennedy’s concern), but these exceptions are few in number, limited primarily to the western arid states, and easily supported by existing science. It is inappropriate, and perhaps absurd, to use the unique characteristics of the Los Angeles River as the basis for condoning harsh agency overreach nationwide.

The holding in *Rapanos* should be applied under the narrowest grounds on which it was formulated.¹⁰⁷ Justice Kennedy’s significant nexus test is a

104. *Id.*

105. Compare *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (holding that the EPA could assert jurisdiction either by meeting the standard set forth by the *Rapanos* plurality or by meeting Justice Kennedy’s significant nexus standard), with *United States v. Gerke Excavating*, 464 F.3d 723 (7th Cir. 2006) (requiring a jurisdictional finding of significant nexus).

106. *Rapanos*, 547 U.S. at 742.

107. *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who

much more expansive interpretation of Congress's grant of authority to the Agencies than that of the plurality. The undefined nature of the significant nexus test leads to overreach by the Agencies. Agency overreach leads to an abuse of federal power and encroachment upon areas of sovereignty traditionally reserved to the States. Because the *Rapanos* plurality test was the narrowest grounds for invalidating the Corps' jurisdiction over the wetlands the *Rapanos* plurality test should be applied to Agency jurisdiction in the case presently before the Sixth Circuit.

The *Rapanos* plurality test is the most prudent application of judicial authority over the Agencies' claim of jurisdiction under the CWA because it clearly defines the Agencies' jurisdictional reach, honors Congress's intent, and respects the States' primary responsibility and rights to regulate pollution and use of land and water resources.

The *Rapanos* plurality test provides a clear, bright-line rule, subject to certain exceptions, which keeps faith with the spirit of cooperative state and federal regulation of the nation's waters. Justice Kennedy conceded that a "mere hydrologic connection," while necessary, might not be sufficient without a showing of "some measure of significance of the connection" resulting in "effects on water quality [that are not] speculative or insubstantial."¹⁰⁸ The *Rapanos* plurality's requirements of relative permanence and continuous surface connection precisely provide such a measure of significance. Beyond these reasonable boundaries, case-specific exceptions or additional Congressional action should be required to avoid ever more degradation of the nation's system of federalism and separation of power.

Conclusion

The WOTUS Rule should be invalidated, in its current formulation, by the Sixth Circuit Court of Appeals. The Agencies violated the APA's notice and comment requirements when promulgating the final WOTUS Rule. The final rule stretches the meaning of "waters of the United States" by using arbitrary distances that are not supported by science, thereby simultaneously exceeding Justice Kennedy's significant nexus test while precluding its entitlement to *Chevron* deference. Finally, the WOTUS Rule constitutes a substantial impingement on the States' primary responsibility and rights to regulate pollution and use of land and water resources. The

concurrent in the judgments on the narrowest grounds.") (quoting another source) (internal quotation marks omitted).

108. *Rapanos*, 547 U.S. at 780-84.

court should look to the narrower rationale given by the Supreme Court, the *Rapanos* plurality test, for a more workable solution. An issue as important as cooperative state and federal regulation of the nation's waters is worthy of a bright-line rule that cannot be obtained through mere application of the significant nexus test. Justice Scalia shows how the waters of the United States can be crystal clear!¹⁰⁹

109. Sadly, Justice Scalia passed away within twenty-four hours of this article being selected for publication. It remains to be seen how his absence from the Court will affect the WOTUS Rule.